Editor's Note: Reconsideration denied by Order dated March 31, 1999

JACQUELINE DILTS

IBLA 94-860 Decided July 24, 1998

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring Native allotment application A-063985 terminated as a matter of law.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   Under section 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1994), which either granted legislative approval or required adjudication of Native allotment applications pending before the Department of the Interior on or before Dec. 18, 1971, an application which is the subject of a valid State protest is not subject to legislative approval and is properly adjudicated under the Native Allotment Act.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   A decision finding a Native allotment application terminated by operation of law pursuant to 43 C.F.R. § 2561.1(f) for failure to file proof of use and occupancy within 6 years after filing the application is properly affirmed when the applicant's use and occupancy began the day before the application was filed and no evidence of use and occupancy was filed within 6 years. Although notice and an opportunity for a hearing are generally required before a Native allotment application is rejected on the ground of the sufficiency of the evidence, no hearing is required when no evidence of 5 years of use and occupancy was tendered in support of the application and, hence, it is deficient as a matter of law.

   Michael Gloko, 116 IBLA 145 (1990), and Andrew Balluta, 122 IBLA 30 (1992), overruled to the extent they are inconsistent.

APPEARANCES: Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Appellant; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Jacqueline Dilts, as the heir of Harry W. Nickoli, has appealed the August 23, 1994, Decision of the Alaska State Office, Bureau of Land Management (BLM), declaring his Native allotment application (A-063985) terminated as a matter of law for failure to file proof of 5 years of substantially continuous use and occupancy within 6 years of the filing of his application as required by regulation. 43 C.F.R. § 2561.1(f). 1/

Native allotment application A-063985 was filed by the Bureau of Indian Affairs (BIA) on behalf of Harry Nickoli on November 23, 1965, pursuant to the Alaska Native Allotment Act of May 17, 1906 (Native Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1994), subject to pending applications. The application was for approximately 160 acres of unsurveyed land described as: Portions of secs. 29, 30, and 31, T. 8 N., R. 3 E., Copper River Meridian, Alaska. Nickoli claimed use and occupancy starting November 22, 1965.

By notice dated March 23, 1967, BLM accepted Nickoli's application and advised him that he was required to submit proof of substantially continuous use and occupancy of the lands for a period of 5 years by November 22, 1971, or the application would terminate without prejudice to the filing of a new application. This notice was returned to BLM by the Post Office as undeliverable. By memorandum dated May 21, 1971, BLM notified BIA that Nickoli had not filed proof of use and occupancy and stated that he had to do so by November 22, 1971. When Nickoli failed to submit the required proof of 5 years use and occupancy, BLM closed the file without further notice to him on December 3, 1971.

Nickoli's Native allotment application was reinstated by BLM on August 27, 1993, in response to a decision by this Board in another case which held that BLM action to close a Native allotment application would

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1/ This regulation was originally enacted as 43 C.F.R. § 67.13 on Dec. 6, 1958 (23 Fed. Reg. 9484). At the time Nickoli filed his application, the requirement of filing proof of 5 years use and occupancy within 6 years of the filing of the application was codified at 43 C.F.R. § 2212.9-3(f) (1965). It is now found at 43 C.F.R. § 2561.1(f). Appellant refers to this regulation as the "statutory life expired" or "stat. life" regulation. This regulation is also sometimes referred to as the "statutory life" regulation. Appellant points out that there is no language in the statute itself imposing a deadline of 6 years from the date the application is filed in which to file evidence of use and occupancy with BLM.

be reversed where the record did not show that a notice or decision was issued rejecting or closing the application. See Andrew Balluta, 122 IBLA 30 (1992). Because BLM had failed to notify Nickoli of the termination of his application in 1971, it reinstated his application. The BLM Decision reviewed the application under the provisions of the Native Allotment Act. One of the provisions of the Act required proof of 5 years of use and occupancy of the lands for which the application was filed. Since Nickoli had failed to file evidence of 5 years of use and occupancy within 6 years of filing his application as required by 43 C.F.R. § 2561.1(f), BLM found his application was legally defective and rejected it. This appeal followed.

In her statement of reasons (SOR) for appeal, Appellant contends that pursuant to section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1994), Native allotment applications pending "on or before" December 18, 1971, are subject either to statutory approval or adjudication under the terms of the Native Allotment Act. Dilts does not dispute BLM's conclusion that there was a valid protest by the State and thus the application was not legislatively approved. 2/ With respect to adjudication of the application, Appellant asserts that under the decision in Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), rejection of a Native allotment application based on insufficiency of the evidence of qualifying use and occupancy requires as a matter of due process both notice and an opportunity for an evidentiary hearing prior to rejection.

Dilts notes that in Heirs of Saul Sockpealuk, 115 IBLA 317 (1990), the Board held that because certain applications "were rejected without a hearing, as required by Pence v. Kleppe, [529 F.2d 135 (9th Cir. 1976)], they were pending before the Department on December 18, 1971," and, hence, BLM was directed to "reinstate these applications and either approve or adjudicate them in accordance with section 905(a) of ANILCA." Heirs of Saul Sockpealuk, 115 IBLA at 326. Appellant also cites the Board decision in Michael Gloko, 116 IBLA 145 (1990). Further, Dilts contends that while BLM correctly reinstated Nickoli's application in recognition of the Balluta decision, it then improperly rejected the application without a hearing in violation of his due process rights as set out in the court decisions in the Pence litigation.

Additionally, Appellant contends that the BLM statutory life regulation requiring submission of proof of use and occupancy within 6 years of filing a Native allotment application provides no basis for rejection of the application without a hearing after repeal of the Native Allotment Act.

2/ The State of Alaska filed a protest with BLM on June 1, 1981, asserting that there was an existing public use trail in the approximate area of Nickoli's claim. BLM concluded that the protest met the criteria set forth under section 905(a)(5) of ANILCA and thus considered it to be a valid protest. The protest was subsequently withdrawn on Oct. 16, 1981.

In support of her contention, Appellant notes that the regulation provides by its own terms that termination of the application pursuant to the regulation will not affect the rights of the Allotment applicant gained by virtue of his occupancy of the land.

Dilts also notes that the District Court in Mary Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985) found that section 905 of ANILCA provided for reinstatement and legislative approval of an application which had been closed since 1967 for failure to provide evidence of use and occupancy. She asserts that since the Olympic decision, the Board has, with one exception, reinstated all "statutory life" terminations coming before it, citing Sockpealuk, Gloko, and Balluta. Appellant maintains that the statutory life regulation always involves a lack of proof of use and occupancy and contends, therefore, that the BLM decision to reject an application without a hearing violates the mandate of Pence v. Kleppe and basic notions of due process. Dilts submits that disputed questions of fact underlay every "statutory life" rejection or termination since they invariably involve proof of use and occupancy. Further, Appellant argues that the Board decision in Heirs of Edward Peter, 122 IBLA 109 (1992), is inconsistent with Gloko and Balluta, as well as violative of Pence due process requirements, and should be overruled.

An Answer to the SOR has been filed by BLM. It is noted by BLM that under the Native Allotment Act an applicant is required to make proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970); 43 C.F.R. § 2561.1(f). Recognizing that section 905 of ANILCA required adjudication of this application, BLM contends that the application was properly rejected without a hearing since the record disclosed no evidence of the statutorily required use and occupancy and thus presented no issue of fact as to the sufficiency of any evidence. It is contended by BLM that all parties are bound by the regulation which requires presentation of evidence of use and occupancy within 6 years of filing an allotment application and provides that an application terminates in the absence thereof. The Pence litigation does not compel a hearing, BLM asserts, when the applicant has failed to provide any evidence of use and occupancy as required by the Allotment Act and the regulations. It is noted by BLM that this holding is consistent with the decision in Heirs of Edward Peter which distinguished Heirs of Saul Sockpealuk on the basis that the application in Peter, like the application in the present case, provided no evidence of compliance with the statutory requirement of 5 years of substantially continuous use and occupancy.

Further, BLM contends that the reasonableness of requiring submission of evidence of use and occupancy within 6 years of filing the allotment application is apparent when it is recognized that the mere filing of an application had the effect of segregating the lands described therein from other types of application and entry. It is indicated by BLM that part of the land described in the application at issue here has been approved as part of a conflicting Native allotment application (A-062349) filed by Alex Sinyon and the balance has been conveyed to a Native Corporation pursuant to section 12 of ANCSA, 43 U.S.C. § 1611 (1994).

In her Reply to BLM's Answer, Appellant asserts that she is entitled to a hearing as a matter of due process under the Pence decisions, arguing that the dates of use and occupancy constitute a question of fact. Further, Appellant contends that the Board decision in Heirs of Edward Peter was wrongly decided and should be overruled. Appellant also asserts that the statutory life regulation is no longer a valid basis for rejection of an allotment application since enactment of section 905 of ANILCA requiring adjudication of the application at issue herein.

[1] The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), authorized the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. The Act was repealed by section 18 of ANCSA, 43 U.S.C. § 1617 (1994), with a savings provision for applications pending before the Department on December 18, 1971. Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1994), enacted subsequently in 1980, provides that all Native allotment applications pending before the Department on or before December 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. Under section 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1994), legislative approval does not apply and a Native allotment application must be adjudicated pursuant to the requirements of the Native Allotment Act if the State of Alaska protests the allotment on the ground that the land is necessary for access. The State's protest of the allotment application on June 1, 1981, pursuant to 43 U.S.C. § 1634(a)(5)(B) (1994), precludes legislative approval of the application in this case and requires that the application be adjudicated under the substantive provisions of the Native Allotment Act and the implementing regulations. The subsequent withdrawal of the protest on October 16, 1981, did not retroactively effectuate legislative approval of the claim or nullify the effect of the protest in requiring adjudication of the claim. United States v. Pestrikoff, 134 IBLA 277, 281 (1995); Marshall McManus, 126 IBLA 168, 171 (1993); Stephen Northway, 96 IBLA 301, 306 (1987). Accordingly, Nickoli's Native application must be adjudicated pursuant to the requirements of the Native Allotment Act.

The dispute in this appeal centers on the nature of the adjudication which is required. Dilts argues that there is a factual dispute here as to use and occupancy and, under Pence, a hearing is required. It is asserted by BLM that there is no factual dispute and no further inquiry into use and occupancy is required once it is found that Nickoli had failed to provide any evidence of 5 years of use and occupancy within 6 years of filing his application as required under 43 C.F.R. § 2561.1(f) and, hence, his application terminated as a matter of law.

[2] The decision in Pence v. Kleppe provided that the interest of a Native in an allotment application gives rise to a due process right to notice and an opportunity for a hearing prior to rejection of the

application on the ground that the evidence of record is insufficient to establish that the applicant achieved 5 years of qualifying use and occupancy. Thus, the court held that:

> [A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143. Applying this principle, the Board subsequently held that when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant's compliance with the use and occupancy requirements, BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, 311-12, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). 3/ The Board has not found the Pence v. Kleppe notice and hearing requirement applicable, however, to those cases in which "taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act." E.g., Franklin Silas, 117 IBLA 358, 364 (1991), aff'd Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996); Agness Mayo Moore, 91 IBLA 343 (1986); Donald Peters, 26 IBLA at 241 n.1, 83 I.D. at 311 n.1.

This principle was applied by the Board in Heirs of Edward Peter, supra. In that case, the Native allotment application at issue was filed in February 1962 alleging commencement of use and occupancy in June 1961. When the applicant failed to provide evidence of 5 years of use and occupancy within 6 years of filing the allotment application despite notice from BLM of the necessity of submitting evidence, BLM notified the applicant that the allotment application had terminated pursuant to the regulation currently codified at 43 C.F.R. § 2561.1(f). After noting that the language of the regulation provided in its own terms that an application will terminate if the allotment applicant does not provide evidence within 6 years, the Board held that no hearing was required under Pence when no evidence of 5 years of use and occupancy was submitted within 6 years of filing the application. Rejecting the assertion that a hearing was required to review the evidence as to whether the applicant established qualifying use and occupancy, the Peter decision held the "declaration of termination did not constitute an implicit factual assessment of Peter's original application or of any other proof of use and occupancy, but was a

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3/ The Ninth Circuit Court of Appeals has since held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe. Pence v. Andrus, supra.

legal conclusion derived from the absence of any such proof in the record." 122 IBLA at 115. We found the Sockpealuk case to be distinguishable in that the allotment applications reviewed in that case asserted that 5 years of use and occupancy had been completed by the time the applications were filed and, hence, BLM rejection of the allotment applications constituted a finding that the evidence of use and occupancy tendered was insufficient. Id.

Appellant argues that the Peter decision is inconsistent with our earlier holdings in the Balluta and Gloko cases. In the Gloko case, as in the Peter case and the case before us, the applicant filed his allotment application within the same year that he initiated occupancy, thus precluding any representation in the application that 5 years of use and occupancy had been achieved. Citing Sockpealuk, we found that the Gloko allotment application, which was before the Department on or before December 18, 1971, had not been adjudicated by BLM as required by section 905 of ANILCA. Accordingly, we vacated the BLM decision denying reinstatement of the application and remanded the case for adjudication of the application. 116 IBLA at 151. Unfortunately, the Gloko decision failed to analyze the impact of BLM's assertion that section 905 required approval or adjudication of those allotments "erroneously" rejected without a hearing and that this was not the case with respect to the Gloko application because no hearing was required where the applicant never provided any evidence of 5 years of use and occupancy. Similarly, in the Balluta case, while the decision is unclear as to the alleged date of initiation of use and occupancy, we failed to analyze the argument of BLM that the applicant was entitled to a hearing only where the application was erroneously rejected without a hearing. Our decision ignored the assertion of BLM that the failure to file any evidence of 5 years of use and occupancy within 6 years of filing the application gave rise to no issue of fact which would justify a hearing. Again in Balluta we vacated the BLM decision refusing to reinstate the allotment application and remanded the case for BLM to approve or adjudicate the application pursuant to section 905 of ANILCA.

Reference to the legislative history of section 905 discloses an explanation relevant to the issue raised by this appeal:

> An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section.

S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1970), reprinted in 1980 U.S.C.C.A.N. 5182 (emphasis added). We find that there was no erroneous rejection of the allotment application in this case. Under the relevant

regulation, the failure to file evidence of 5 years of use and occupancy within 6 years of filing the application itself caused the application to terminate. 43 C.F.R. § 2561.1(f). Indeed, the language of the regulation provides that in the absence of submission of proof within 6 years the application "will terminate." As noted in the Peter decision, this regulatory language was promulgated subsequent to the amendment of the Native Allotment Act to require "proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." 4/ 122 IBLA at 114. Because the applicant in this case failed to provide any evidence of 5 years of use and occupancy, our decision in Peter is controlling and we find that the application is properly rejected without a hearing for failure to provide any evidence of the statutorily required use and occupancy. Our decisions in Gloko and Balluta are herein expressly overruled to the extent they are construed to require a different result. 5/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

4/ Act of Aug. 2, 1956, Ch. 891, § 1(e), 70 Stat. 954 (formerly codified at 43 U.S.C. § 270-3 (1970)).

5/ In those cases, unlike the present case, BLM had refused to reinstate the allotment applications. The Board decisions required BLM to reinstate the allotment applications and adjudicate them under the Native Allotment Act as required by section 905 of ANILCA. Adjudication of Native allotment applications has never been construed to require notice and an evidentiary hearing when, accepting the truth of the matters asserted in the application, the application was legally deficient.